

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN MARINOVICH,
Defendant in Error.

No. 1934

IN ERROR TO THE UNITED STATES CIRCUIT
COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, WESTERN
DIVISION.

Brief of Defendant in Error

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STATEMENT.

We desire to make some additions to the statement of the case as contained in the opening brief.

Defendant in error (hereinafter called plaintiff) lived at Wilkeson and worked as a coal heaver at that place at different times. He left Wilkeson on the morning of the 12th of May, 1910, buying a ticket to South Prairie.

(Record, page 21.) Wilkeson is distant about five miles from South Prairie. McMillin, the point where the accident occurred, is eleven miles west of South Prairie, and between South Prairie and McMillan is Orting Station, three miles from South Prairie and eight miles from McMillin. (Record, page 47.) Wilkeson is not on the same line of railway as are McMillin, Orting, and South Prairie, save that the branch line from Wilkeson comes into the other line at South Prairie. This seems to us important, because from his residence at Wilkeson, plaintiff might be presumed to have some knowledge of train schedules at that point, and it is to be remembered that trains going through that point do not run by or through McMillin, the point where he was hurt. Puyallup is a station west of McMillin. The freight train which caused his injury was west bound. After the accident plaintiff was brought on that train to Puyallup (Record, page 46), where he was placed in a hospital.

The plaintiff testified:

"In the month of May last I was working at Fairfax, ten miles from Wilkeson, for the Fairfax Company and the Tacoma Smelter. I was working as a coke heaver, forking coke into a box car. I have been doing this for eight or nine years. * * * I was earning \$3.50 a day before I got hurt. On the morning of the 12th of May I left Wilkeson and went on the train to South Prairie and from there I walked down to McMillan, so that I could see the country, *as I was looking for a piece of land*. I got to McMillan about noon and went inside the depot there to wait for a train to South Prairie. It was the first time I had ever been there and I did not know about the trains going through there. *I wanted to take the first train to South Prairie to see Mr. Joe Lee. I*

would buy a ticket or pay on the car, but there was no agent there. *I had money to pay my way.* I sat down about ten minutes inside the depot, then along came a train, run as fast as a passenger train, and logs fell off and smashed the depot and myself." (Record, pp. 21-22.)

It appears that there are two little stores besides the station house at McMillin. Prior to getting hurt, plaintiff had bought a lunch at one of these stores. On cross-examination, he testified as follows:

"Q. Who did you see there?

A. One girl.

Q. That is the girl in the store you bought the lunch from?

A. Yes.

Q. Did you ask her anything about the trains?

A. I asked her what time the train, and sometimes it comes along and sometimes not. She said it comes along sometimes.

Q. That was all she said?

A. Yes, sir.

Q. She did not tell you when it would come?

A. No; did not say at all what time it come. * *

* ** Record (page 24).

During the course of the cross-examination the following incident occurred:

"MR. QUICK: Will Mr. Ohls please come forward? (Gentleman comes forward.)

Q. (To plaintiff) Did you see this man there at McMillin and talk to him?

A. I don't know now; that is a long time.

Q. Didn't you talk to him in the Austrian language?

A. No, sir.

Q. Didn't talk to him there?

A. No, sir.

Q. *Didn't you borrow ten cents from him to get lunch with?*

A. *No, sir. Had plenty of money in my pocket.*

Q. You didn't get ten cents from this gentleman to buy lunch with?

A. No, sir; if I did that, you may take my head off * * *.

Q. How many of the stores were you in at McMillin?

A. Two stores.

Q. *Were you in both of them?*

A. No.

Q. Just to one store where the girl was?

A. Yes.

Q. Did you ask to buy a railroad ticket of anybody?

A. No.

Q. You did not inquire about a railroad ticket?

A. Nobody at the depot.

Q. Did you ask for the agent?

A. No agent there.

Q. Did you ask this girl where you could find the agent?

A. There was no agent; the depot was over on the other side of the County Road. The sign was there on the station; nobody there * * * *.

- Q. You just asked her when the train would come?
- A. Yes, that is all." (Record, pp. 24-5-6.)

ARGUMENT.

The main question to be considered in this cause is whether the learned Judge erred in submitting the case to the jury.

It is conceded that plaintiff was in the station or waiting room of the defendant four hours and forty-five minutes before the time for the arrival of a train on which he could take passage. This much being conceded, it is the contention of learned counsel for the defendant that as a matter of law, the Court should have held the length of time unreasonable and instructed accordingly.

The learned counsel concedes that, within a reasonable time before the departure of the train upon which he intends to take passage, a person who goes to the place provided for the reception of intending passengers is entitled to all the protection which is vouchsafed to passengers. We have no quarrel with anything that is decided in the cases cited in defendant's brief. The difference in the facts and circumstances attending them is what differentiates those cases from the present one.

Earnshaw v. United States, cited at page 16 of counsel's brief, was brought for the recovery of duties upon imported iron. The question turned on the reasonableness of the notice of hearing given by the merchant appraiser, and the Court say:

"The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court."

In *Chicago, R. I. & P. Ry. Co. vs. Thurlow*, cited on page 17 of their brief, the passenger had reached his destination, the journey was over, and the Court held that the relation of carrier and passenger was terminated.

In *Gulf C. & S. F. Ry. Co. vs. Henry*, cited on page 20 of their brief, plaintiff, of his own volition, had taken a mixed train which did not run to the station to which he was ticketed.

In *Matson vs. Port Townsend Southern R. R. Co.*, the Washington case cited on page 22 of their brief, plaintiff was injured while fishing along defendant's right-of-way. The rights of a passenger or intending passenger were not involved. The Court at page 453 say:

"It follows from what we have said that the plaintiff was a trespasser upon the right-of-way of appellant at the time he was injured."

In *Illinois Cent. R. Co. vs. Laloge*, cited at page 26 of their brief, plaintiff went to the depot at 8 o'clock in the evening and was informed that a train would not be due until 1:05 in the morning. At 10 o'clock he was assaulted in the depot, and the Court held that he could not claim the rights of a passenger. It will be observed that here the circumstances enabled him to get the information as to his train at the depot and that he actually had secured it two hours before he was injured.

In *Andrews vs. Yazoo & M. V. R. Co.*, cited at page 27 of their brief, the plaintiff, while at the depot to take a train which he had been informed would not arrive for an hour or so, was injured in an altercation with the station agent, and it was held that he could not claim the rights of a passenger.

In *Archer vs. Union Pacific R. Co.*, cited on page 27, plaintiff was one of a party of excursionists occupying a car upon a siding. He was injured in going to the car the morning after its arrival. Held, that he could not claim the rights of a passenger.

It will be observed that, in their facts, none of the cases cited by counsel have anything in common with the present case.

Generally speaking, “The term ‘reasonable time’ is relative, and its meaning depends entirely upon the circumstances.”

23 A. & E. Enc. of Law, 2nd Ed., page 971.

“What constitutes a reasonable time is a mixed question of law and fact depending on the particular circumstances.”

Bishop on Non-Contract Law, Sec. 1161.

Louisville etc. Railroad v. Mahan, 8 Bush. 184.

Mote v. Chicago etc. R. Co., 27 Iowa 22.

The view which the learned Circuit Judge took of the question now under consideration is so clearly stated in his charge that we are constrained to cite it.

"It is not the policy of the law to require railroad companies to maintain their station facilities for the benefit of persons who at some future time expect to become passengers; there must be some limit as to the right of a person to use a station with the obligations, or rather with the rights, of a passenger. Now, the law does not fix that limit by any number of minutes or any number of hours or in any other way; it says a reasonable time. What is a reasonable time is a question in this case of fact for you to determine. It depends upon the circumstances of the case. The circumstances here are more or less contested. I will not undertake to state the circumstances pro and con. They have been argued by counsel and appear in the evidence. It is for you to say under all those circumstances whether at the time of the occurrence it was a reasonable time for the plaintiff to be there intending to take passage upon the next train."

Counsel is right in the statement which they make at page 29 of their brief, viz.: "What constitutes a reasonable time must depend upon the facts of each particular case." And, while it may be true, as they suggest, that no Court, probably, has held four hours and forty-five minutes to be a reasonable time under any circumstances, we, nevertheless, venture the opinion that no Court has held four hours and forty-five minutes to be an *unreasonable* time under circumstances such as are shown here.

An examination will disclose that in each and every case cited by them, where the rights of an intending passenger were involved, information as to the time of arrival of trains was available at the place where passage was to be taken, while in this case there was neither

agent, depot master, porter, or other servant representing the defendant. There was neither blackboard, time-table or other information to be had as to the time when the "next" or any train would be due thereat. And these are circumstances to be taken into consideration in determining whether any particular period of time would be reasonable or unreasonable. Especially so where, as in this case, the plaintiff had never been at that point or place before. He was a stranger and had absolutely no knowledge as to the schedule of trains stopping at that point.

Will counsel say that a railway company performs its whole duty to intending passengers when it makes absolutely no provision whatever at the station house or place where it expects them to take passage whereby such intending passengers can procure information as to train schedules? At page 19 of their brief it is said:

"It was the duty of the plaintiff to inform himself of the time when he could depart from McMillin on one of defendant's trains."

From whom and from what source would counsel have had the plaintiff inform himself as to the time when he could depart on defendant's train from McMillin to South Prairie? Is it unreasonable that a stranger at a railroad point, wholly unfamiliar with the schedule of trains departing from that point, should rely on being able to get the necessary information at that place or point which the company has marked out and appointed as the place

or point for taking passage? At page 24 of their brief, counsel say:

"The statements of persons not connected with the railroad company are not binding upon the company and *do not justify one in acting thereon.*"

And in support of that statement counsel cite the case of *Hasse vs. Oregon Ry. & Nav. Co.* (Ore.), 24 Pac. 238, where the Court say:

"It is difficult to see how the unauthorized acts or words of a stranger who is not shown to have any connection with the defendant company could affect or bind it."

And, yet, the inexorable logic of counsel's position is that it was plaintiff's duty to have sought the information necessary to regulate his conduct from that very source which counsel and the Court condemn. He could not get information at the station house, or on the premises of the defendant, nor was there anybody, or anything, at that place to tell or to indicate to him that he could buy a ticket at Hale's store, *nor* is it contended nor does it appear *that there was a sign or anything else at the store to indicate that the railway company did business or had tickets for sale there.* Neither is it claimed, nor does it appear, that there was anything in or around the station directing intending passengers to go to the store to transact their business. Surely, counsel will not contend that their train schedule, like the time of the rising of the sun and the going down thereof, is a matter within the common knowledge of all mankind! What,

under the circumstances, could plaintiff do but sit down at the appointed place and wait for a train? The station was open, inviting him to enter. He did so, and within a few minutes was seriously injured — so seriously, indeed, that one can only marvel at the paucity of the verdict.

“It was on the right-hand side of the track, going toward Orting, and it was just a small frame building with one end closed and used as a warehouse for freight, and the other end was used as a waiting-room. This waiting-room had an opening on the side next to the track, like a place built for a door, but no door was put in, and there were three benches inside, which were used for seats. One of the benches was against the wall along the side and the other two against the end walls. This building was about eight or nine feet from the track, and on each end was painted the word ‘McMillin.’ The station building is located on the railway company’s right-of-way and about eight or nine feet back from the nearest rail.” (Test, G. W. Hale, Record, p. 13.)

The question we have been discussing argues itself. To state it is to argue it.

DID THE COURT ERR IN THE ADMISSION OF EVIDENCE?

We think Assignment No. III requires little consideration. In defendant’s affirmative answer it is alleged that “plaintiff was a trespasser upon either its freight train or upon its right-of-way and premises at McMillin, Washington, without right or authority, * * * and not for the purpose of transacting business with the defendant,” etc. (Record, page 7.)

The evidence which is the basis for the assignment was received upon the re-direct examination of the plaintiff. During his cross-examination of the plaintiff, learned counsel for the defendant asked a gentleman in the court room, Mr. Gus Ohls, to come forward and confront the witness, and, addressing the plaintiff, proceeded:

"Q. Did you see this man there at McMillin and talk to him?

"A. I don't know now; that is a long time.

"Q. Didn't you talk to him in the Austrian language?

"A. No, sir.

"Q. *Didn't you borrow ten cents from him to get lunch with?*

"A. No, sir. Had plenty of money in my pocket.

"Q. You didn't get ten cents from this gentleman to buy lunch with?

"A. No, sir; if I did that, you may take my head off."

So that, by their answer, they seek to put the plaintiff in the position of a trespasser and a hobo, and by this incident of the cross-examination, as a beggar and a vag. It was under these circumstances that the Court, in its discretion, permitted the testimony, not "as a circumstance to be taken into consideration by the Court and jury *tending to prove the relation of carrier and passenger,*" as stated on page 9 of counsel's brief. In view of the language of the answer and the somewhat unusual incident occurring on cross-examination as above related,

we submit it was within the discretion of the Court to permit this evidence as, in a sense, repelling the insinuation that he was a beggar. The learned trial judge who witnessed the somewhat dramatic incident surely committed no reversible error in this instance.

Counsel do not urge insufficiency of evidence to sustain the verdict other than as applied to Assignment No. I. Therefore, the references on pages 10 and 32 of their brief to the testimony of their claim agent and the nurse at the hospital, as we view it, have no relevancy to any error assigned; but, if we are mistaken in this, then we suggest that it is probable that the jury did not believe their testimony in the respects mentioned, as against the testimony of the plaintiff and other facts and circumstances appearing in the evidence. In any event, their verdict concludes the defendant, who has not moved against it for insufficiency. Without any objection from counsel, it was shown by the foremen, Tucker and Broomfield, of the Wilkeson Coal and Coke Company, for whom the plaintiff had worked, that he was a good workman and "his wages generally averaged about \$3.00 per day." (Record, page 31.) It was also shown by the testimony of another witness that the plaintiff had at least \$20.00 in money on the evening prior to the day in question. (Record, page 32.) And this was unobjected to.

It also appeared that he was rendered unconscious by the injury and remained so until after arriving at the hospital at Puyallup, whence he was taken on the freight

train which caused his injury. (Test. Dr. Bair, Record, page 15, and Test. Conductor Ronan, Record, page 46.) There was ample opportunity for him to lose his money in the confusion attending the accident or between the place of the accident and the hospital.

Gus Ohls, the party who was brought forward to confront the plaintiff while upon cross-examination, as hereinbefore mentioned, was called as a witness for the defense, and asked concerning his interview with the plaintiff on the day of the accident. On direct examination, he testified:

"I do not recollect about giving him any money; as to that, I would not say yes or no; there are so many going up and down the railroad I cannot swear to it. I think we were talking about money, but I don't remember. *I don't think I gave him money.*"

And on cross-examination:

"I saw him go to Ball's store and he came out and went into this little waiting-room and had been there a few minutes when the train came along and the accident happened. *He talked with me something about the price of land was an acre and I told him and he said it was too high, too much money.*" (Record, page 44.)

We think the testimony of this witness is important in two respects. First, it does not sustain the imputation of counsel that the plaintiff sought to beg ten cents or any other sum from the witness. And, second, because it does show that the plaintiff was inquiring of the witness regarding the price of land, and this corroborates

the testimony of the plaintiff, who said that his walk from South Prairie to McMillin that day was for the purpose of looking at the country *with the view of buying land.*

On page 10 of their brief, counsel refer to the testimony of Mr. Newton, their claim agent, and Miss La Plante, the nurse, in regard to a written but unsigned statement prepared by the claim agent, to a portion of which, at least, these witnesses assert the plaintiff assented. It is claimed that on Saturday, the 21st of May, just nine days after receiving the injury, the nurse admitted the claim agent to the bedside of the plaintiff, and that in the course of his statement the plaintiff admitted that he intended to walk back to South Prairie. (Record, pages 40 and 41.) That he made such a statement plaintiff strenuously denied. (Record, pages 30-31-35.)

Among other injuries, plaintiff's tongue was badly cut and lacerated in the accident. On page 22 he says, "My tongue pretty near bit off." The same nurse, Miss La Plante, who corroborates the claim agent, admits on page 43 of the record that "for the first week plaintiff was in the hospital the doctors saw him every day and sometimes *twice a day*; he was in a *very critical condition.*"

The plaintiff is a foreigner, has little understanding of English and talks it poorly and brokenly. (Record, page 42.) For a week after going into the hospital his condition was "*very critical.*" And yet, nine days after

the injury it is claimed that he made the statement attributed to him by the nurse and the claim agent. The jury heard their testimony, heard his denial, were advised of the surrounding circumstances, and it is obvious from their verdict that they believed the plaintiff. In any event, the verdict has not been attacked for insufficiency of evidence in this particular, and it is difficult to perceive what legal bearing it can have upon this controversy.

Considering that defendant raises no question as to the sufficiency of the evidence save as going to the question of the reasonableness of the time between the happening of the injury and the arrival of the train on which he was to take passage; considering, further, that no question arises in respect to the charge of the Court; in the light of the verdict, it must be concluded that the case is sufficient in all other respects to establish defendant's liability.

In other words, an occurrence so unusual as that which caused this injury (Record, page 46) would be one from which the jury might infer *that want of care* and degree of caution which the law required of the defendant for the safety and protection of those entitled to claim rights as passengers.

It is respectfully submitted that the judgment should be affirmed.

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